FILED
MAR 29 1973
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-1186

TOP VISION CABLE CO. OF KY. - - Petitioner

versus

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN C. FISHER, Commissioner, ALTON PUCKETT, Commissioner - Respondents

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BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 72-1186

TOP VISION CABLE CO. OF KY. - - *Petitioner*

v.

CITY OF OWENSBORO, KENTUCKY, a Municipal Corporation of the Second Class, and IRVIN TERRILL, Mayor, WAITMAN C. TAYLOR, Commissioner, JOHN D. MILLER, Commissioner, JOHN C. FISHER, Commissioner, ALTON PUCKETT, Commissioner - *Respondents*

BRIEF IN OPPOSITION

The Respondents respectfully pray that the writ of certiorari to review the judgment and opinion of the Kentucky Court of Appeals rendered September 22, 1972, as prayed for by Petitioner, be denied.

OPINION BELOW

The opinion of the Kentucky Court of Appeals is reported at 487 Southwestern Second 283.

JURISDICTION

Title 28 U.S.C. §1257(3) does not invoke this Court's jurisdiction in the instant case.

QUESTIONS PRESENTED

I. Is the judgment of the United States District Court for the Western District of Kentucky in Civil Action No. 2519 *res judicata* that the complaint in this case presented no federal question?

II. Was a federal question raised below?

III. Was the question here asserted to be a federal question timely raised below?

IV. The judgment herein rests on adequate state grounds.

V. Was Petitioner denied due process of law by the Kentucky Court of Appeals?

STATUTES, RULES AND ORDINANCES INVOLVED

The following statutes, rules and ordinances are here involved:

(1) Resolution No. 56-70 of the Board of Commissioners of the City of Owensboro, Kentucky—See Appendices, pp. 70-71.

(2) Rules of Court of Appeals (R.C.A.) of Kentucky, 1.240, which is here set out verbatim.

> "The appellant may file a reply brief within 20 days after the appellee's brief is filed. No subsequent briefs will be considered unless filed with leave of Court.
> (Am. Eff. 1-1-63)."

(3) Rules of Court of Appeals (R.C.A.) of Kentucky, 1.350, which is here set out verbatim:

"(a) A party adversely affected by an opinion of the Court in an appealed case may petition the Court for (1) a rehearing, or (2) a modification or extension of the Opinion, or both, and the opposing party may file a response thereto.

(b) Except in extraordinary cases when justice demands it, a petition for rehearing shall be limited to a consideration of the issues argued on the appeal and will be granted only when it appears that the Court has overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented on the appeal or the law applicable thereto.

(c) When it is desired to point out and have corrected any inaccuracies in statements of law or fact contained in an opinion of the Court, or to extend the opinion to cover matters in issue not discussed therein, and the result reached in the opinion is not questioned, a party may request a modification or extension.

(d) In the event a petition for rehearing is sustained, a party adversely affected by the new opinion may petition for a rehearing, modification or extension under the same Rules governing the original petition for rehearing, modification or extension.

(Am. eff. 7-1-71)"

(4) 47 C.F.R. Sec. 76.31:

"SUBPART C—FEDERAL-STATE/LOCAL REGULATORY RELATIONSHIPS

§ 76.31 Franchise standards.

(a) In order to obtain a certificate of compliance, a proposed or existing cable television sys-

tem shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:

(1) The franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process;

(2) The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification, and shall thereafter equitably and reasonably extend energized trunk cable to a substantial percentage of its franchise area each year, such percentage to be determined by the franchising authority;

(3) The initial franchise period and any renewal franchise period shall be of reasonable duration;

(4) The franchising authority has specified or approved the initial rates which the franchisee charges subscribers for installation of equipment and regular subscriber services. No changes in rates charged to subscribers shall be made except as authorized by the franchising authority after an appropriate public proceeding affording due process;

(5) The franchise shall specify procedures for the investigation and resolution of all complaints regarding the quality of service, equipment malfunctions, and similar matters, and shall require that the franchise maintain a local business office or agent for these purposes;

(6) Any modifications of the provisions of this section resulting from amendment by the Commission shall be incorporated into the franchise within one (1) year of adoption of the modification, or at the time of franchise renewal, whichever occurs first.

Provided, however, That, in an application for certificate of compliance, consistency with these requirements shall not be expected of a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first.

(b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds three percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program. The provisions of this paragraph shall not be effective with respect to a cable television system that was in operation prior to March 31, 1972, until the end of the system's current franchise period, or March 31, 1977, whichever occurs first."

COUNTERSTATEMENT OF THE CASE

(1) The Petitioner's franchise expired by its own terms. The franchise (see Petition for Certiorari, Franchise Agreement, p. 28) contained this provision:

> ". . . (i)t being understood, as a condition of this franchise, that the construction of such system shall be completed to the extent of making available community antenna service to substantially all the citizens of Owensboro, Kentucky, on or before two years from the date hereof, or this franchise shall be null and void without further notice or further act by the party of the first part. *For cause, in its sole discretion,* the Board of Commissioners of the City of Owensboro, Kentucky, may extend said two (2) year deadline from time to time upon written application for same by the second party at least sixty (60) days prior to said deadline or extension thereof." (Emphasis added.)

(2) Petitioner constructed approximately one-third of the required CATV system within the two-year period.

(3) In two successive extensions of time (the first for one year (and the second for two years) gratuitously granted by the City to Petitioner for the completion of its CATV system, Petitioner made no additions to its system. On December 19, 1970, when Petitioner filed suit in the Daviess Circuit Court, Owensboro, Kentucky—five years after the granting of the franchise, three years after the initial deadline for the completion of the system—Petitioner still claimed only to have constructed a CATV system adequate for

one-third of the citizens of Owensboro, Kentucky (Complaint, Daviess Circuit Court, App. pp. 40-51).

(4) The franchise made the granting of extensions for the completion of the CATV system entirely a discretionary matter with the City, to be exercised only upon written application from the franchise holder ". . . at least sixty (60) days prior to . . ." the deadline for the construction of the system or any extension of such deadline. Petitioner's request for its third extension of time was not made until November 4, 1970, or 14 days beyond the deadline fixed by the contract (Resolution 56-70, App. pp. 70-71).

The City exercised its discretionary legislative power by declining to grant a third extension of time for compliance with the contractual completion date.

(5) The Petitioner recites that the Kentucky Court of Appeals' decision ignored the severability clause of the contract. This is erroneous. The Kentucky Court of Appeals stated:

> "The city further contends that the 26-percent clause cannot be severed from the remainder of the agreement without doing violence to one of the underlying purposes of the franchise, to-wit, to provide revenue to the City, and the elimination of the clause vitiated the contract. This contention, we believe, is sound" (see Petition for Certiorari, p. 17).

(6) The complaint filed by Petitioner in Civil Action No. 2519 in the United States District Court for the Western District of Kentucky presented substan-

tially the same case as is presented by the complaint in this case (App. pp. 15-21). The parties are the same. No appeal was taken from the Memorandum and Order entered November 23, 1970.

ARGUMENT

I.

The Judgment of the United States District Court for the Western District of Kentucky in Civil Action No. 2519 Is *Res Judicata* That the Complaint in the Case Presented No Federal Question.

The complaint in Civil Action No. 2519 in the United States District Court for the Western District of Kentucky (App. pp. 15-21) presented substantially the same case as is presented by the complaint in this case (App. pp. 15-21). The parties there were the same as the parties here. The final judgment in that case (entitled "Memorandum and Order"), entered by the Court on November 23, 1970 (App. pp. 21-24) was that the Court had no jurisdiction because no federal question was presented. The plaintiff there had opportunity to present and press upon the Court any and all federal questions presented by the controversy between the parties, that is, any and all federal questions which were raised by all that had happened before its complaint was filed. Instead, the plaintiff there limited itself to urging the Court to take jurisdiction of questions of state law under the theory of pendent jurisdiction.

There was no appeal from that judgment dismissing the complaint for want of jurisdiction. Petitioner, here, has had, in that case, its day in Court on its claim

that the complaint in this case presents questions of federal law. It is estopped to urge such claim here. See *Partmar Corporation* v. *Paramount Pictures Theatre Corporation,* 349 U. S. 89 (1954); *United States* v. *Moser,* 266 U. S. 236 (1924); *Connelly Foundation* v. *School Dist. of Haverford Tp.,* 326 F. Supp. 241 (D.C., E.D. Pa. 1971); Scott, *Collateral Estoppel* by Judgment, 56 Harv. L. Rev. 1, 7-10 (1942). See also *Catholic Society of Religious and Literary Education* v. *Madison County,* 74 F. 2d 848 (4th Cir. 1935); *Toosigah* v. *United States,* 186 F. 2d 93, 101 (10th Cir. 1950); *Ripperberger* v. *A. C. Allyn & Co., Inc.,* 113 F. 2d 332 (2nd Cir. 1940), cert. den. 311 U. S. 695 (1940).

II.

The Question Here Asserted To Be a Federal Question Was Not Timely Raised Below.

Here the FCC Regulations to which Petitioner refers were adopted March 31, 1972. The decision of the Court of Appeals herein was rendered September 22, 1972. Petitioner thus had ample time to seek leave of the court to tender by supplemental brief any contentions it wished to argue with respect to the effect of the Regulations upon its cause. R.C.A. 1.240. Petitioner did not do so. It rested its case on other arguments and sought to raise a federal question only in a Petition for Rehearing filed after this case was decided.

Except in extraordinary cases where justice demands it, under Kentucky law a question not argued

before a decision is rendered, cannot be raised in a Petition for Rehearing. R.C.A. 1.350; *Commonwealth, Dept. of Highways* v. *Thomas,* Ky., 427 S. W. 2d 213 (1967). The failure of the Petitioner to timely raise the question it would here assert, precludes Petitioner from raising it here. *In Re Lamkin,* 355 U. S. 59 (1957); *Ferguson* v. *Georgia,* 365 U. S. 570 (1961); Stern and Gressman, *Supreme Court Practice,* 4th Ed., p. 120.

III.

A Federal Question Was Not Raised Below.

The FCC Regulation Petitioner cited to the Kentucky Court of Appeals, 47 C.F.R. Sec. 76.31 (March 31, 1972) (cited by Petitioner as P. & F. Radio Reg. Sec. 85.31 (March 31, 1972)) was not made effective by the FCC with respect to cable television system that were in operation prior to March 31, 1972 until the end of a system's then franchise period or March 31, 1977 whichever occurs first. 47 C.F.R. Sec. 76.31(b). The Regulation would have application to Petitioner's franchise on March 31, 1977. Thus there is no basis for the ingenious contention by the Petitioner that the Kentucky Court of Appeals somehow violated a federal right of the Petitioner by not holding that the noneffective regulation must be looked to in order to find the intention of the parties to the 1965 contract. The Petitioner has not favored the Court with a full explanation of its argument and the writer is unable to clarify it.

FCC Regulations do indeed, as Petitioner observes, control many aspects of a CATV operation. But the Petitioner has raised no federal question by making this observation. It takes no citation of authority, it is submitted, for the fundamental principle that the mere fact that an activity or business is in many ways controlled by a federal statute or regulation, does not make any question that may arise in regard to the business or activity a federal question, as the Petitioner seems to contend. To raise a federal question a litigant must demonstrate that a dispute between him and his adversary will be resolved one way if a construction of a federal measure he advocates is adopted by a court and another way if the construction his adversary advocates is adopted. *Gulley* v. *First Nat. Bank,* 299 U. S. 109 at 112, 113 (1936), and cases there cited.

An examination of the Petition of Appellee for Rehearing in which Petitioner states it raised a federal question, will reveal that the effect of the Petitioner's argument with respect to an FCC Regulation was that: (1) the 26% payment provision of its franchise contract was invalid because of an FCC Regulation, and (2) that such Regulation did not invalidate the entire contract. The first proposition (although inaccurate because as hereinbefore shown the Regulation was not then applicable to the contract) added nothing to Petitioner's case because the City of Owensboro had conceded to the position theretofore advanced by the Petitioner that such payment provision was invalid and unenforceable by virtue of Article I, Sec-

tion 8, Clause III of the Constitution of the United States. Neither did the second argument raise a controversy, federal or otherwise, because the City had never contended and the Court had not held that the franchise contract was invalid because of the FCC Regulation the Petitioner cited. (See Appellant, City of Owensboro's, Response to Appellee's Petition for Rehearing, App. pp. 25-39). Thus, although the Petitioner cited a federal measure, it raised no federal question in the Court below.

IV.

The Judgment Herein Rests on Adequate State Grounds.

When Petitioner failed to abide by the construction schedule of its contract, its franchise terminated under Kentucky law. *Davis* v. *City of Bowling Green,* Ky., 289 S. W. 2d 506 (1956).

This ground of invalidity of the Petitioner's franchise was pressed both in the Trial Court and Kentucky Court of Appeals, but the Court of Appeals did not find it necessary to reach this issue. Since that Court might have rested the judgment herein on such state grounds, this Court should not take jurisdiction to review the judgment. *Stembridge* v. *Georgia,* 343 U. S. 541 at 547 (1952).

V.

Petitioner's Claim of Lack of Due Process Is Groundless.

The Petitioner claims, in effect, that the rejection of its contentions by the Court of Appeals denied it due process of law. No authority is cited for this proposition. It is clear that mere unsuccess of a litigant, even if a court errs in deciding against him, is not sufficient to disclose a substantial due process question. *American Railway Exp. Co.* v. *Kentucky,* 273 U. S. 269 (1927); *Arrowsmith* v. *Harmoning,* 118 U. S. 194 (1886); 32 Am. Jur. 2d, Federal Practice and Procedure, §52, p. 46.

The principle is too well established to require further argument.

CONCLUSION

For the reasons herein, the Petition for Certiorari to the Kentucky Court of Appeals should be denied.

Respectfully submitted,

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